

Nieves v Pacifica Found.

2007 NY Slip Op 33476(U)

October 23, 2007

Supreme Court, New York County

Docket Number: 0118938/2006

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

SANTIAGO NIEVES

INDEX NO.

118938-06
~~113948/2006~~

Plaintiff,

-v-

PACIFICA FOUNDATION d/b/a WBAI

MOTION DATE
MOTION SEQ. NO.

8/13/07
001

Defendant.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED
OCT 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/23/07

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
SANTIAGO NIEVES,

Plaintiff,

Index No. 118938/06

-against-

PACIFICA FOUNDATION d/b/a WBAI,
Defendant.

FILED
OCT 25 2007
NEW YORK
COUNTY CLERK'S OFFICE

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WALTER TOLUB, J.:

Defendant moves, pursuant to CPLR 3211 (a) (5) and 3211 (a) (7), for an order dismissing the complaint. Defendant further moves, pursuant to 22 NYCRR § 130-1.1 through 130-1.2, for an order directing payment of defendant's attorney's fees and costs incurred in bringing this motion.

Facts

This is an action for breach of contract, quantum meruit, and violation of Labor Law § 191 (1) (d) and (3). Defendant is a non-profit organization that establishes and operates several licensed radio broadcasting stations, including WBAI-FM (WBAI). Plaintiff worked for WBAI in various capacities, including as a volunteer, from 1972 through the end of 2001.

The complaint alleges that in late 2000, WBAI's General Manager at the relevant time,¹ Utrice Leid (Leid), offered

¹ Plaintiff alleges, upon information and belief, that Leid was replaced as General Manager in December 2001.

plaintiff a paid position as host of WBAI's morning show. In or around January 1, 2001, plaintiff began hosting the radio show at WBAI, entitled "Latino Journal," which was devoted to issues of interest to the Latino community in New York City. Plaintiff claims that he was given a temporary salary of approximately \$1,200 per month, while his permanent compensation package was being negotiated. He contends that Leid subsequently offered him a compensation package of \$54,000 annually, plus health insurance and other benefits retroactive to January 1, 2001, for a term of employment of a minimum of one year. The complaint states, inter alia, that, in or around the end of 2001 or January 2002, plaintiff was informed that his radio show had been cancelled, and that his employment was terminated. Plaintiff claims that defendant refused to pay him the benefits promised in the compensation package.

The first cause of action asserts that plaintiff satisfactorily performed the agreed-upon services for WBAI, and that defendant breached its contract with plaintiff by refusing to pay plaintiff an annual salary of \$54,000, plus health insurance and other benefits for hosting and producing "WBAI This Morning" in 2001. The second cause of action for quantum meruit alleges that plaintiff performed services for defendant in expectation of compensation, and that the reasonable value of plaintiff's services, as agreed to by WBAI, was \$54,000, plus

* 4]
health insurance and other benefits. Finally, the third cause of action asserts violation of Labor Law § 191 (1) (d) and (3), based upon defendant's failure to pay plaintiff the wages and benefits under the parties' agreement.

Defendant generally denies the allegations of the complaint, and argues that it is entitled to dismissal of the complaint, which was commenced four years after the subject events, based upon the statute of limitations and the statute of frauds.

Discussion

The standards for evaluating a motion to dismiss pursuant to CPLR 3211 (a) (7) are well settled. The courts must liberally construe a pleading, accept all the facts alleged therein to be true, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory (Graziano v County of Albany, 3 NY3d 475, 481 [2004]; Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]); Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Sanders v Winship, 57 NY2d 391, 394 [1982]).

However, when the moving party offers documentary evidence extrinsic to the pleading, the court need not assume the truthfulness of the pleaded allegation (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). If documentary evidence is presented, the standard becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (id. at 275).

[* 5]

Dismissal is only appropriate if the documentary evidence definitively dispose of the plaintiff's claims by resolving all of the factual issues as a matter of law (Gephardt v Morgan Guar. Trust Co. of New York, 191 AD2d 229 [1st Dept 1993]; Standard Chartered Bank v D. Chabbott, Inc., 178 AD2d 112 [1st Dept 1991]).

A cause of action for breach of contract must specify the terms of the agreement, the consideration, the performance by plaintiff and the basis of the alleged breach of the agreement by defendant (see Noise in the Attic Productions, Inc. v London Records, 10 AD3d 303 [1st Dept 2004]; see also Furia v Furia, 116 AD2d 694, 695 [2d Dept 1986]). Plaintiff sufficiently stated a claim for breach of contract by alleging that the parties entered into an agreement, which plaintiff satisfactorily performed, and defendant failed to pay the monies it had promised to plaintiff for plaintiff's performance.

However, defendant argues that plaintiff was represented by a union at the time of his employment, thus, his claims are barred by the federal six-month statute of limitations, which applies to lawsuits which are commenced by a union employee against an employer for an unfair labor practice. Defendant claims that the United Electrical, Radio & Machine workers of America (the UE) was the exclusive bargaining representative for plaintiff and other WBAI employees beginning on July 20, 1995 through September 30, 2001, at which time the American Federation

of Television and Radio Artists (AFTRA or, collectively with the UE, the Unions) became the exclusive bargaining representative of WBAI's employees.²

Where an employee is represented by a recognized union, and there is a contract pursuant to a collective bargaining agreement between the union and an employer who is engaged in commerce, the suit against the employer rests on Labor Management Relations Act § 301 (Textile Workers Union of America v Lincoln Mills of Alabama, 353 US 448, 450-51 [1957]). In DelCostello v International Brotherhood Of Teamsters, (462 US 151 [1983]), the Supreme Court noted that the most appropriate statute of limitations to be applied to actions by private employees against their employers or unions for unfair labor practice established under the National Labor Relations Act is six months.

Although most of the cases cited by defendant apply to law suits where the employee is suing both the employer and the union, it is well-established that the same statute of limitations applicable to actions commenced against both the union and the employer applies also when a breach of contract

²In December 2000, the collective bargaining agreement between WBAI, defendant, and the UE Local 404 was extended from December 31, 2000 to September 30, 2001. On August 16, 2001, the UE transferred its exclusive bargaining representation of rights as to all employees represented by UE at WBAI to AFTRA.

[*7]

action is commenced only against the employer (see United Parcel Service v. Mitchell, 451 US 56 [1981]).

The complaint is silent as to plaintiff's involvement with a union. However, the evidence submitted by defendant in support of its motion to dismiss definitely resolves this matter since Plaintiff was a member of a union and covered by a collective bargaining agreement (CBA) while he was employed by WBAI. The copy of the collective bargaining agreement between WBAI and UE, dated July 20, 1995, submitted by defendant states, inter alia, that "[t]he Employer recognizes the UE as the sole exclusive bargaining agent for all paid and unpaid, full time or part time programming, technical bookkeeping, and clerical works, excluding the Manager, Assistant Manager, and Program Director" (CBA § 1). It follows that the federal six-month statute of limitations applies to this action, as opposed to the six-year statute of limitations which is applicable to a state breach of contract claim (CPLR 213 [2]).

Plaintiff started working in his capacity as a talk show host in January 2001. The UE was the exclusive bargaining representative for the Plaintiff and therefore the six month statute of limitations applies to his claims. Plaintiff ceased working for Pacifica in January 2002, and it was not until December 21, 2006, well over six months after his causes of action accrued, that Plaintiff commenced the instant action,

